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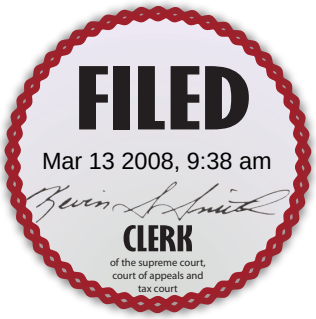

IN THE
COURT OF APPEALS OF INDIANA

STEVEN SANDER PARFENOFF,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 64A05-0707-CV-367
	)	
DAWN MARIE PARFENOFF,	)	
	)	
Appellee.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William A. Alexa, Judge
Cause No. 64D02-0401-DR-728

March 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Steven Parfenoff ("Father") appeals from the trial court's order granting a petition to modify custody filed by Dawn Parfenoff ("Mother"). Father presents a single issue for our review, namely, whether the evidence supports the trial court's conclusion that a substantial and continuing change in circumstances justifies a change in custody.

We affirm.

FACTS AND PROCEDURAL HISTORY

Mother and Father were married and had two children during the course of their marriage. S.P. was born on March 30, 2001, and E.P. was born on June 30, 2003. In January 2004, Mother filed a petition for dissolution of marriage. In October 2004, the parties filed a Partial Mediation Agreement ("custody agreement") with the trial court. That agreement provided in relevant part:

> 1. Physical and Legal Custody. The parties shall share physical custody of their minor children, [S.P.], date of birth, March 30, 2001, and [E.P.], date of birth, June 30, 2003, subject to the parenting time provisions outlined in paragraph 3 below. The parties' minor children shall be enrolled in the school district where [Mother] currently resides. In the event [Mother] relocates from her current residence and the children's school district changes as a result of same, then the issue of which school the children should attend shall be revisited by the parties. The parties shall be granted joint legal custody of their minor children, as same is defined by statute. Specifically, the parties shall consult together regarding the issues of education, religion and health care, as said issues relate to said children.
>
> * * *
>
> 3. Parenting Time. The parties shall be granted the following parenting time rights with their minor children, subject to the terms and conditions outlined herein:
>
> > A. Weekend and Weekday Parenting Time. Until the parties' minor child, [S.P.], commences kindergarten, the parties shall be granted

> parenting time with their minor children during what would be considered the children's school year according to the following repeating two week schedule:
>
> i. [Father] shall be entitled to parenting time commencing at 6:00 p.m. on the Friday of the week that the children recess from school for their summer break through Tuesday at 4:30 p.m.;
>
> ii. Then [Mother] shall be entitled to parenting time from Tuesday at 4:30 p.m. through 8:30 a.m. on Saturday;
>
> iii. Then [Father] shall be entitled to parenting time from Saturday at 8:30 a.m. through Tuesday at 4:30 p.m.; and
>
> iv. Finally, [Mother] shall be entitled to parenting time from Tuesday at 4:30 p.m. through Friday at 6:00 p.m.
>
> B. Weekend and Weekday Parenting Time. Commencing the week the parties' minor child, [S.P.], begins kindergarten, the parties shall be granted parenting time with their minor children during their children's school year according to the following repeating schedule:
>
> i. [Father] shall be granted parenting time from Friday at 6:00 p.m. through Monday morning when the children are scheduled to begin their school day; and
>
> ii. [Mother] shall be granted parenting time from the time the children recess from school on Monday through Friday at 6:00 p.m. If the children are not in school on Monday, then [Father] shall be permitted to extend his Monday parenting time until the time [Mother] concludes her Monday work day.
>
> iii. Provided, however, [Mother] shall be entitled to parenting time with the parties' minor children on the first Saturday of each month from 9:00 a.m. through 2:00 p.m. [Mother] shall be required to provide [Father] with seven (7) days notice of her intent not to exercise her Saturday parenting time.

Appellant's App. at 19, 25-26 (some emphasis original, some emphasis added). Thereafter, the parties filed their Final Mediation Agreement ("final agreement") and

proposed dissolution decree with the trial court. The trial court entered the final decree on February 28, 2005, approving and adopting the parties' mediation agreements.

On August 18, 2006, Mother filed a Verified Petition for Rule to Show Cause and for Modification of Child Custody and Child Support. Mother alleged that Father was drinking and smoking around the children in violation of the decree and that he "harassed Mother telephonically on numerous occasions." Appellant's App. at 17. In addition, Mother alleged that there had been a substantial and continuing change in circumstances in that S.P. was about to start kindergarten, which rendered joint physical custody of S.P. "no longer viable." Id. Mother also asserted that Father was refusing to "cooperate in co-parenting" of the children, and Mother asked that the trial court order that Father undergo a mental health evaluation. Id.

Following a hearing, the trial court granted Mother's Petition in part. The trial court found and concluded in relevant part as follows:

> 1. That there has been a substantial change in circumstances that now makes the current Order with respect to custody unreasonable. That the parties' oldest child has begun kindergarten and the joint physical custody is no longer in the best interest of the children. That the current custody order shall be modified and the Mother shall be awarded sole physical custody. The parties shall continue to share joint legal custody. During the school year, Father shall have the children pursuant to parenting time guidelines with the exception that on his alternating weekends, he shall be allowed to keep the children overnight on Sunday night and then he shall return [E.P.] to her mother and drop [S.P.] off at school.
>
> * * *
>
> 5. That while Father has the children, he shall not smoke in the presence of the children and shall not allow anyone else to smoke in the presence of the children. Additionally, Father shall not consume any alcoholic beverages while the children are with him for parenting time.

* * *

> 8. That the Court reaffirms all issues of the parties' mediated agreement with respect to custody and parenting time that are not in conflict with the above.

Id. at 11-12. This appeal ensued.

DISCUSSION AND DECISION

Father asserts that the trial court abused its discretion when it granted Mother's petition to modify custody because, he contends, Mother failed to present any evidence of a substantial and continuing change in circumstances that would justify a change in custody. In Spoor v. Spoor, 641 N.E.2d 1282, 1284-85 (Ind. Ct. App. 1994), this court explained our standard of review:

> Upon an initial custody determination, the trial court presumes that both parents are equally entitled to custody. However, in a petition to modify custody, the petitioner must demonstrate the existence of changed circumstances so substantial and continuing as to make the existing custody order unreasonable. The standard is in place to avoid the disruptive effect of moving children back and forth between divorced parents and to dissuade former spouses from using custody proceedings as vehicles for revenge. Accordingly, it has long been recognized that the welfare of the children is paramount and is promoted by affording them permanent residence rather than the insecurity and instability that follow changes in custody. This is so even though at any given point in time the noncustodial parent may appear capable of offering "better" surroundings, either emotional or physical.
>
> The standard, however, does not require a trial court to find that the present custodial parent is unfit prior to granting a change. The changes asserted in the petition are to be judged in the context of the whole environment. A trial court's inquiry in proceedings to modify a custody decree is strictly limited to consideration of changes in circumstances which have occurred since the last custody decree.

And in Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002), our Supreme Court stated:

> We review custody modifications for abuse of discretion, with a "preference for granting latitude and deference to our trial judges in family law matters." In re Marriage of Richardson, 622 N.E.2d 178, 178 (Ind. 1993) (affirming trial court judgment shifting primary custody of children to father). We set aside judgments only when they are clearly erroneous, and will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment. Id. at 179 (citing Ind. Trial Rule 52(A)).
>
> Indiana Code Section 31-17-2-21 provides in relevant part:
>
> (a) The court may not modify a child custody order unless:
>
> (1) the modification is in the best interests of the child; and
>
> (2) there is a substantial change in one (1) or more of the factors that the court may consider under section 8 and, if applicable, section 8.5 of this chapter.
>
> (b) In making its determination, the court shall consider the factors listed under section 8 of this chapter.

And Indiana Code Section 31-17-2-8 provides:

> The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:
>
> (1) The age and sex of the child.
>
> (2) The wishes of the child's parent or parents.
>
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
>
> (4) The interaction and interrelationship of the child with:
>
> (A) the child's parent or parents;
>
> (B) the child's sibling; and
>
> (C) any other person who may significantly affect the child's best interests.

(5) The child's adjustment to the child's:

(A) home;

(B) school; and

(C) community.

(6) The mental and physical health of all individuals involved.

(7) Evidence of a pattern of domestic or family violence by either parent.

(8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Here, the trial court found that "there has been a substantial change in circumstances that now makes the current Order with respect to custody unreasonable. That the parties' oldest child has begun kindergarten and the joint physical custody is no longer in the best interest of the children." Appellant's App. at 11. Father contends that "there is absolutely no evidence in the record in this case which supports a determination that [A.P.]'s commencement of kindergarten was affected in any way by the continuation of shared physical custody between his parents." Brief of Appellant at 8. We cannot agree.

In essence, Father asserts that because the parties anticipated and planned for A.P.'s starting kindergarten in the original Custody Agreement, there has not been a change in circumstances with respect to that event. But to plan for a contingency does not mean that the circumstances affecting that contingency cannot change to render the plan inappropriate. Here, for instance, when the parties entered into the Custody

Agreement, which provided for A.P. entering kindergarten, they did not know whether they would be able to communicate effectively and cooperate as parents after the divorce. Because there is evidence in the record that the parties have had significant difficulty in communicating and co-parenting, and because that bears on the success of the custody arrangement, the trial court's finding and conclusion on this issue is not erroneous.[1] See, e.g., In re Marriage of Cain, 540 N.E.2d 77, 78 (Ind. Ct. App. 1989) (holding "breakdown in communication and cooperation between the joint custodians was a substantial and continuing change in circumstances making joint [legal] custody order unreasonable."). Indeed, Father made this same argument to the trial court, and the trial court rejected it.

We conclude that the trial court's findings and conclusions are amply supported by the evidence presented at the hearing on Mother's petition to modify custody. The evidence supports the trial court's determination that there has been a change in circumstances so substantial and continuing that it is in the children's best interests that Mother be awarded sole physical custody. Father's contentions on appeal amount to a request that we reweigh the evidence, which we will not do. We cannot say that the trial court's judgment is clearly erroneous or that the court abused its discretion when it granted Mother's petition to modify custody.

Affirmed.

BAILEY, J., and CRONE, J., concur.

[1] For instance, again, Mother testified that Father makes harassing phone calls to her. Father admitted having called Mother a "crazy bitch" during a disagreement on the phone. Transcript at 109.